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The Invasion of Panama and the Rule of Law**

In the early morning hours of December 20, 1989, the United States invaded Panama. First came the air attack; Stealth bombers and other warplanes dropped 422 bombs. Then 24,000 American troops assaulted Panama City.

Two weeks later, General Manuel Noriega—the "maximum leader" of Panama, a ruthless dictator and a reputed international drug kingpin—surrendered to American forces. Jubilant crowds teemed into the streets of Panama to celebrate what Panamanian Vice President Ricardo Calderon termed "[o]ur full liberation from the dictatorship of Noriega," and in Washington President Bush announced that America's objectives had been achieved. More than 500 people had been killed in the invasion, including hundreds of civilians; thousands were seriously wounded.

Although the invasion and the arrest of General Noriega were popular, many lawyers found them disturbing. President Bush ordered massive military action without congressional approval; the invasion violated the charters of both the Organization of American States (OAS) and the United Nations; and, in part, the United States invaded another country to arrest someone on foreign soil. From the time the invasion began, there have been vigorous debates over whether the invasion and the arrest of General Noriega violated statutory law, constitutional law or international law—and even whether the conduct of foreign policy should be constrained by legal considerations.

On the second day of the invasion, President Bush sent Congress a report explaining his reasons for the action. Although he did not formally recognize its validity, the President's report nevertheless complied with the requirement of the

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War Powers Resolution[1] that the President report to Congress within forty-eight hours of introducing armed forces into hostilities.

Congress enacted that legislation in 1973—after President Nixon had unilaterally ordered military action in Laos and Cambodia, and over his veto—"to fulfill the intent of the framers of the Constitution . . . and insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities. . . ." The Resolution requires that unless Congress declares war or specifically authorizes military action (or cannot meet because of an attack on the United States), the President must terminate use of the armed forces within sixty days of submitting his report.

But the War Powers Resolution does not merely require the President to report to Congress after the fact; the President must consult Congress "in every possible instance" before involving American troops in hostilities.

Was it possible for the President to consult Congress before the invasion? In his message to Congress, President Bush said that he acted for four reasons: to safeguard American lives; to help restore democracy; to protect the integrity of the Panama Canal Treaty; and to bring General Noriega to justice.

A need to protect American lives can be a compelling reason to act quickly and without warning. Noriega's troops were repeatedly harassing American military personnel, and just days before the invasion they killed a U.S. Marine. But the 14,000 American soldiers already stationed in Panama were capable of protecting themselves and other Americans, as well as the canal. More lives would be saved by restricting Americans to U.S. bases than by sending them into combat.

There was no impediment to Congress' debating whether to go to war to protect democracy in Panama or the integrity of the Panama Canal Treaty; in fact, those are precisely the kind of issues appropriate for congressional debate. Perhaps Noriega would have been harder to capture if he had been forewarned, but arresting someone is not a matter of vital national interest.

Indeed, if President Bush really invaded Panama to capture Noriega, there is reason to worry whether he was overly influenced by anger and hubris. Noriega had thumbed his nose at the United States: he double-crossed the U.S. Drug Enforcement Agency for which he had been an operative; he suspended the results of the May 1989 election, giving as his excuse a news report that President Bush had authorized $10 million in covert aid to the opposition candidate; he survived a coup, while U.S. troops stood by indecisively; and his National Assembly declared that "a state of war" existed between Panama and the United States. The more brazen Noriega's actions, the more Bush was subjected to the insult he most resents—being called a "wimp."

Even President Bush may not be sure whether he acted partly out of pique. When Congress declares war—by majorities in the two separate houses—there is less of a chance of being propelled by emotion.

1. 50 U.S.C. §§ 1541–1548 (1988).

President Bush could have consulted Congress before ordering the invasion of Panama, and therefore he violated the War Powers Resolution. Some argue, however, that the Resolution is unconstitutional because it attempts to unduly restrict presidential authority; they contend that the President's inherent powers are sufficient for him to have ordered the Panama invasion on his own authority.

Article II, section 1 vests the "executive Power" in the President and makes him the Commander-in-Chief of the armed forces. Article I, section 8 gives Congress the power to "declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water." Those who favor presidential power contend that because the framers deliberately decided (by a vote of 7-2) to use the words "declare war" rather than "make war," they must not have intended to give Congress the exclusive prerogative to make war. To this they add the fact that the Constitution gives Congress "[a]ll legislative Powers herein granted"[2]—thereby limiting congressional power to the expressly enumerated list—but vests an "executive Power" without any similar restriction in the President.[3] They conclude that the President has all powers not specifically granted to the other branches, including the power to make war.

But it is a forced argument. The Constitution does not recognize a power to "make war," and the attempt to fashion a distinction between making war and declaring war is made out of whole cloth. The only war power is given to Congress. The framers did not play semantic games with the Constitution, expecting lawyers to play hide and seek with words used and not used. A reading that strains to magnify the powers granted to the President and diminish those vested in Congress is an exercise in advocacy, not constitutional interpretation.

It is often suggested that while Congress has the authority to declare a full-scale war, the President, as Commander-in-Chief, may engage U.S. troops in lesser conflicts. But constitutional scholars report that when the framers gave Congress "the power to issue letters of marque and reprisal, they referred to the power to authorize a broad spectrum of armed hostilities short of declared war."[4] Moreover, it is hard to argue that ordering 24,000 American troops into combat against the armed forces of Panama was not tantamount to declaring war.

A second argument for presidential power is precedent. Presidents have sent American troops into combat situations 212 times while Congress has declared war only seven times. Certainly the constitutional plan has not consistently been followed, but the Constitution is not rewritten by ignoring it.

A third argument is necessity. The modern world is increasingly dangerous; we must contend with ballistic missiles, weapons of mass destruction, terrorism, and a host of other perils. Most agree that the President has the authority born of

2. U.S. CONST. art. I, § 1.

3. *See, e.g.*, Goldwater v. Carter, 617 F.2d 697, 704–05 (D.C. Cir.), *vacated*, 444 U.S. 996 (1979) (President has the power to abrogate treaties).

4. Jules Lobel, *Covert War and Congressional Authority: Hidden War and Forgotten Power*, 134 U. PA. L. REV. 1035, 1046 (1986).

necessity, that he can act when there is not time for congressional action or when public debate would destroy the ability to act. The President must act if the United States is attacked suddenly, and, for example, President Carter could not have been expected to ask Congress for authority to order American commandos to free the American hostages held in Tehran. But the necessity argument cannot give the President more powers than necessity requires—and it was simply not necessary for the President to invade Panama without consulting Congress.

When the President ordered the invasion of Panama, therefore, he violated the War Powers Resolution and he exceeded his constitutional authority.

He also violated treaty commitments. The OAS Charter, which both the United States and Panama signed, provides: "The territory of a State is inviolable; it may not be the object, *even temporarily,* of military occupation or of other measures of force taken by another State, directly or indirectly, *on any grounds whatever.*" (Emphasis added.) The U.N. Charter requires members to "refrain . . . from the threat or use of force against the territorial integrity or political independence of any state."

The OAS condemned the American invasion of Panama by a vote of 20-1, the U.N. by 75-20.

There is nothing in the Panama Canal Treaty that permitted the United States to invade Panama, notwithstanding the President's rhetoric of acting to protect the "integrity" of that treaty. (Note the deft use of language; President Bush said he acted "to protect the integrity of the Panama Canal Treaties"[5] rather than to protect the canal or to act in accordance with the treaty, thereby blurring any specific meaning.)

One court has held that the President may unilaterally terminate a treaty,[6] and there is even some authority for the proposition that the President may disregard international law when he deems it necessary to the national interest to do so.[7] These are by no means established principles of law, although it is settled law that the President has "plenary and exclusive power . . . as the sole organ of the federal government in the field of international relations. . . ."[8]

Yet even this power, "like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution."[9] Treaties are, under article VI of the Constitution, the supreme law of the land. Abrogating a treaty is one thing, but violating it is something else entirely; it is the difference between changing a law and disregarding it. Moreover, President Bush did not purport to terminate the Panama treaty; he said he acted to protect its integrity, and he certainly did not intend to terminate the United States' commitment to the OAS and U.N. Charters.

5. N.Y. TIMES, Jan. 4, 1990, at A12, col. 5.
6. *Goldwater,* 444 U.S. at 996.
7. *See* Garcia-Mir v. Meese, 788 F.2d 1446, 1455 (11th Cir.), *cert. denied,* 479 U.S. 889 (1986).
8. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936).
9. *Id.*

Perhaps the most interesting legal aspect of the Panama invasion involves the arrest of General Noriega. In 1988, two federal grand juries indicted Noriega for conspiring to distribute narcotics in the United States. No one denies that it is desirable to bring alleged drug traffickers to trial, but is the rule of law served by invading another country to make an arrest?

The question has been asked before. In May of 1960, an Israeli commando team secretly made its way into Argentina, kidnapped Adolf Eichmann, and spirited him back to Israel to stand trial for crimes against humanity and the Jewish people. Both Eichmann and Noriega were charged with committing crimes completely outside the jurisdiction that indicted them—that is, Israel tried Eichmann for crimes he committed in Germany and the United States indicted Noriega for crimes he committed in Panama—although in both instances the crimes affected citizens of the indicting nation. And both Eichmann and Noriega were captured by force on the soil of another sovereign nation, although Eichmann was abducted without loss of life.

Following Eichmann's abduction, Argentina instituted a proceeding against Israel in the United Nations but it later withdrew it in return for an apology. Because only nations have standing to speak in international law, there was no one left to demand that Eichmann be returned to Argentina. Panama also chose not to contest the Noriega arrest; those succeeding him to power in Panama had political reasons for not wanting him returned.

Of course, Eichmann and Noriega argued that the charges against them should be dismissed because they had been brought before the court by illegal means. But it is United States law, and that of most other nations as well, that the "body" of defendant is never suppressible as a fruit of an unlawful arrest; that is, an illegal arrest does not deprive the court of jurisdiction to try the defendant. Noriega conceded this principle, but argued that an exception exists when, in the words of a Second Circuit case, the arrest involves "the government's deliberate, unnecessary and unreasonable invasion of the accused's constitutional rights."[10] But only violations of the *accused's* constitutional rights are relevant, and Noriega could not maintain that he, himself, had been mistreated.

The Eichmann court reached a similar result. Yet there is something troubling here. Writing at the time of the Eichmann trial, one commentator said:

> Whatever sympathy lies with Israel for the crimes committed against her people and whatever moral justification there may have been, to those who firmly believe that the future of the world depends upon the ability of men and nations to lay down and follow positive rules for peaceful conduct among themselves, the bad taste of kidnapping, of achieving justice through an unlawful act, still remains.[11]

The idea of bringing Eichmanns and Noriegas to trial may be appealing, but scoundrels are not the only ones at risk. The Iranian parliament has, for example,

10. United States v. Noriega, 746 F. Supp. 1506, 1530 (S.D. Fla. 1990), *quoting* United States v. Toscanino, 500 F.2d 267, 275 (2d Cir. 1974).

11. Zad Leavy, *The Eichmann Trial and the Role of Law*, 48 A.B.A. J. 820, 822 (1962).

enacted legislation authorizing Iranian officials to arrest Americans anywhere in the world for violations of Iranian law.

The hard question is not whether the invasion of Panama and the arrest of General Noriega were lawful. They were not. The hard question is why foreign policy should be constrained by law at all. After all, the Panama invasion freed Panama from a despot, gave it the opportunity to reestablish democracy, and brought an international drug kingpin to justice.

International law often seems little more than a trap for the naive. We live in a dangerous world—a world with Stalins, Hitlers, Khomenis, Saddam Husseins, and swarms of lilliputian imitators such as Manuel Noriega. How can Good shackle itself to the law while Bad runs free?

Across the spectrum of ideology, Americans began to lose faith in international law. Speaking to the ABA's Section of International Law and Practice, conservative Jeane Kirkpatrick said that unilateral compliance with international law is a "suicide pact"; writing in the *New Republic* liberal Charles Krauthammer pronounced international law "an ass," adding: "It has nothing to offer. Foreign policy is best made without it."[12]

The Panama invasion came at low ebb for America's faith in international law. Just one year later America was at war in the Persian Gulf. If the chronology of the two events were reversed—that is, if Iraq's seizure of Kuwait and the ensuing events had come first—the United States may well have seen things differently.

For despite the horrible consequences of war, the experience in the Persian Gulf taught many lessons.

It taught that the Constitution (and the War Powers Resolution) can work. The President can ask Congress to authorize military action, and Congress can respond. Indeed, Congress can debate the wisdom of going to war, and even after a close vote the nation can join together and act forcefully.

It showed that international law does not require helplessness. The coalition's action did not violate precepts of international law, which recognize the rights of states to defend themselves, individually and collectively, and to come to the aid of those being treated in a way that shocks the conscience.

It demonstrated that nations cannot always violate international law with impunity. Transgressors can be punished.

It renewed faith in the United Nations, and it even created hope for a new world order.

These are still nascent concepts, and international law can impose frustrating constraints. When a nation possesses both moral authority and military might, why should it be crippled by international law? Why suffer a Noriega when there is the power to remove him?

12. DANIEL P. MOYNIHAN, ON THE LAW OF NATIONS 133 (1990).

Perhaps there is no better answer than the one given by Robert Bolt in his famous play, *A Man for All Seasons*. At one point in the play Sir Thomas More's friend, Roper, says that he would "cut down every law in England" to get at the Devil. Sir Thomas More responds:

> Oh? And when the last law was down, and the Devil turned round on you—where would you hide, Roper, the laws all being flat? This country's planted thick with laws from coast to coast—man's laws, not God's—and if you cut them down—and you're just the man to do it—d'you really think you could stand upright in the winds that would blow then?[13]

Sometimes it's necessary to resist eliminating a Manuel Noriega—not for his sake, but for the rule of law.

13. Robert Bolt, *A Man for All Seasons* 38 (Vintage ed. 1960).